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CQ403

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NEPA Task Force
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To Whom it May Concern:

The American Farm Bureau Federation is pleased to offer our comments on the problems our members experience with the implementation of the National Environmental Policy Act (NEPA), and our suggestions for improving the process.

It is clear that NEPA is not working as intended by Congress. The intent of the NEPA process is to ensure that impacts to the environment are considered in agency decision-making. The NEPA process is supposed to be a procedural process and not a substantive one. It has become substantive in the sense that costly process and interminable appeals very often force cancellation of proposed actions. Instead of being one element to consider in the decision-making process, NEPA has become the overriding consideration in any decision.

The broad, general language defining the environmental review process has never been adequately supplemented by agency direction. Federal courts have defined the scope and direction of NEPA policy, and not the agencies that have to comply with it. The result is uncertainty at all levels about what is needed to comply with NEPA. Federal agencies routinely do much more analysis than is necessary to address an issue in order to make an analysis defensible in court. NEPA decisions are also routinely appealed and litigated. A recent report issued by the Forest Service indicates that over 40 percent of agency time is spent working on NEPA or NEPA-related activities. The "procedural" process envisioned by Congress has become a substantive one, as proposed agency projects collapse under the weight of NEPA requirements.

Individual farmers and ranchers are also directly impacted by burdensome NEPA processes, especially those who must obtain federal permits of some sort or who rely on some agency within the federal government for technical or cost-sharing support. Livestock ranchers using federal lands for grazing must obtain federal grazing permits. Farmers or ranchers undertaking water projects involving either the Corps of Engineers or the Environmental Protection Agency must obtain permits. All these activities involve preparation of environmental reviews pursuant to NEPA.

CQ403

The problems with NEPA are only now receiving media attention. The devastating wildfire season has brought to light both the need for thinning our nation's forests and the difficulties encountered in accomplishing it. Most of the difficulties center around navigating the NEPA process. The U.S. Forest Service recently published a report entitled "The Process Predicament," which describes the stranglehold red tape, such as NEPA, has on the ability of the agency to perform its responsibilities.

A rancher told of his experience with the NEPA process:

His livestock grazing permit was up for renewal. Although he had been grazing livestock under the permit for 10 years, he was supposed to have a NEPA analysis to determine whether he should continue. The NEPA process for this one permit has been ongoing for the past six years. (Fortunately he was able to obtain a renewal pending completion of NEPA under a special provision of the law.) The permittee says he has spent over \$200,000 defending this one permit and has a stack of paper over 24 inches high to show for it. There have been four administrative appeals filed against his permit—two by environmental groups, one by an individual who files appeals against all grazing permits in the area and one by the permittee himself, who says filing an appeal is the only way he can stay involved with the fate of his own permit.

This story only involves one permit. There are almost 30,000 permits to graze livestock on federal lands.

Following are some specific concerns with how NEPA is currently being administered, and some suggestions for improvement.

1. NEPA analysis must consider the "human environment." The NEPA statute requires a statement be included "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Despite this requirement, the "human environment" rarely receives more than a perfunctory glance. These cursory reviews often are separate from any consideration of natural environmental impacts. The human element is an important part of the "environment" in which decisions are made.

Council on Environmental Quality (CEQ) and action agencies need to specify in regulations the social and economic impacts on people within a decision area and must be better addressed as part of the environmental analysis. Moreover, these social and economic analyses must be considered as part of the entire analysis.

2. Economic interests must be given standing to challenge NEPA actions to the same extent as environmental interests. A number of federal courts, most notably in the 9th and 10th federal circuits comprising the area where most NEPA analyses are conducted, have held that people whose economic interests are impacted by NEPA analyses do not have standing to challenge those analyses. These courts reason that NEPA is an environmental statute, and economic interests are not within the "zone of interests" to be protected by NEPA.

CQ403

These cases make a process that is already biased against social and economic concerns even more so. As indicated in the Forest Service's report entitled "How Statutory, Regulatory, and Administrative Factors Affect National Forest Management," action agencies routinely over-analyze impacts and attempt to tailor their products so they will withstand legal challenges. If economic interests are excluded from this review process, agencies can ignore the social and economic impacts of an action without fear of challenge. By the same token, they over-emphasize the natural environmental impacts of an action to insulate them from lawsuits from environmental interests. The result is a process that completely and unfairly shuts out one important part of the total "environment" from a critical part of the NEPA process.

A regulatory recognition of the inclusion of social and economic interests as part of the "human environment"—like Congress intended—would help to restore some semblance of balance to this process. NEPA regulations should take the further step of explicitly recognizing social and economic interests—as part of the "human environment"—have standing to challenge NEPA analyses to the same extent as other interests.

3. The "no action alternative" needs to be clearly defined as the status quo. NEPA was generally intended to apply to new projects or new federal activities. Courts and agencies have required NEPA analyses also be conducted for ongoing activities, such as renewal of federal permits. For example, the agencies have said federal livestock grazing permits must undergo NEPA analysis prior to renewal.

The action agencies are required to consider a "no action alternative" as part of their NEPA analysis. That alternative is supposed to be the status quo—what happens if nothing different is done. It is meant to serve as a baseline upon which other alternatives may be considered and compared. For new projects, the "no action alternative" is the state of affairs if a permit were not granted or the action did not take place. That is clear.

For ongoing projects or for permit renewals, however, the situation is different. The "status quo" in these cases is the condition as if the permit were ongoing or if the action were permitted to continue on its present terms. In the case of grazing permits, environmental conditions are reviewed every year to some degree as the agency determines appropriate stocking rates. Yet this is not the way agencies have interpreted the "no action alternative."

Agencies construe the "no action alternative" to be the non-renewal of a permit or the discontinuance of the particular action. This is not the status quo. Non-renewal of permits, for example, can result in significant changes in environmental conditions from the conditions that existed while the permit was in operation. As such, it is not a true baseline, as the "no action alternative" was intended to be. The impacts from non-renewal of a permit or discontinuance of an activity need to be considered separately.

The "no action alternative" needs to be clarified to mean the true environmental baseline upon which different alternatives can be measured. For permit renewals or ongoing activities, the only true baseline is the condition as if the permit or activity were continued.

CQ403

4. CEQ and the action agencies must regain control over defining the scope and requirements of NEPA analyses. One of the major problems with the NEPA process is it is being run by the courts in a piecemeal and a case-by-case basis. The statutory provisions of NEPA are very broad, with plenty of room for agency interpretation. Instead of taking advantage of this opportunity, the agencies have let court decisions from different parts of the country dictate the process on a piecemeal basis. The result is an uncertain process in which agency personnel doing NEPA work are not sure what the requirements are. As a result, agencies often do much more analysis than is necessary, or spend more time trying to insulate their work from judicial attack. They become mired in the process. The Forest Service estimates that planning and assessment consumes 40 percent of direct work, at a cost of \$250 million. The agency also estimates it could re-direct \$100 million to on-the-ground work with more efficient processes. The Forest Service is not alone.

Agencies would obtain greater efficiencies with NEPA if requirements were spelled out more clearly and administrative uncertainties were minimized. NEPA gives the federal agencies, in conjunction with CEQ, the authority to define and develop procedures "which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." (43 U.S.C. 4332 (B)).

CEQ should better and more clearly define key NEPA terms such as "major federal action," "no action alternative" and "significant impacts on the human environment," so action agencies have a better idea of what their requirements are. NEPA processes need to be better and more clearly defined in order to withstand judicial attack. The NEPA Task Force needs to develop a clear administrative roadmap for satisfying NEPA requirements, enact it into regulations, and defend it in court. While a certain amount of agency flexibility is necessary to accommodate different agency situations, CEQ should take a stronger position on core elements of key aspects of the NEPA process.

Thirty years of NEPA litigation should tell us where the major problem areas are, and what areas need to be fixed. CEQ is charged with enacting regulations to implement NEPA, and the creation of the Task Force provides the opportunity for reviewing NEPA and revising its process. Strong CEQ regulations could help the executive branch reclaim control over the NEPA process. In so doing, it would guide agencies to become more efficient and effective in the way they discharge their NEPA responsibilities.

5. CEQ and the action agencies should better define and delineate when an Environmental Analysis is sufficient and when an Environmental Impact statement is required. A significant problem with the way NEPA has been administered is the lack of clear understanding as to when an Environmental Analysis (EA) is sufficient, and when a more detailed Environmental Impact Statement (EIS) is required. This issue has probably engendered the bulk of NEPA litigation over the years. As mentioned above, this lack of certainty leads to agency inefficiency in responding to NEPA requirements.

CEQ and the Task Force could reduce much of this uncertainty and inefficiency by sharpening the distinction between when EA's are sufficient, and when an EIS is required.

CQ403

CEQ should sharpen the definition of "major federal actions significantly affecting the quality of the human environment" to provide better guidance on this critical issue. More importantly, a clearer sharper definition would provide greater certainty to agency personnel who have to perform the NEPA work. A bright line distinction might not always be possible, but greater clarity will provide better guidance to agency personnel.

Greater certainty in determining when an environmental assessment is sufficient will also reduce the amount of litigation. That will save both time and money for both the agency and the applicant.

6. CEQ and the action agencies should specify with much more clarity the level of analysis that is sufficient to meet the requirements of NEPA, and the type of information required to be analyzed. A related issue concerns the level of analysis agencies are required to perform under NEPA, and the considerations they must make in evaluating alternatives. How detailed do different analyses have to be in order to meet NEPA requirements? What issues must an agency consider with regard to certain impacts? Both agencies and the NEPA process itself would benefit from clearer answers to these questions. Greater clarity will help agency personnel determine what they must consider, and how much in depth it must be analyzed. It will provide a measure to determine NEPA adequacy, in contrast to the amorphous process being inconsistently shaped by the courts on a case-by-case basis.
7. Narrow the definition of "affected interests" who can appeal NEPA decisions to those who are actually affected. Another issue impacting the NEPA gridlock is the fact that for the price of a postcard, anyone can file an administrative appeal of a NEPA analysis. There are people who file appeals on every governmental action, regardless of where it is or what it does. The agencies are clogged with administrative appeals, filed for no other purpose than to delay implementation of a project. The appeals process needs to be amended to focus on people or entities that are actually impacted by a proposal, not to anyone who philosophically disagrees with a project.

While this suggestion does not directly relate to the processes under the National Environmental Policy Act, it has important indirect implications. The Forest Service and other agencies iterate that NEPA documents are geared toward an appeals officer or a judge, and not for sound agency decision-making. Requiring some impact from the proposal might limit the process to those who are going to be actually affected by an action.

8. Regulations should provide that appeals must contain specific and substantive information regarding the grounds for the appeal before it may be considered. Related issues include the fact that the requirements for filing an appeal in NEPA cases are minimal. It has been said that "anyone with the price of a postcard" can file an administrative appeal of an agency decision. The administrative appeals process needs to be amended so that minimum informational standards for appeals are set in order to preclude the postcard appeals. Appeals should contain specific and substantive information regarding the grounds for the appeal, and reasons why the agency decision should be overturned. This type of process would hopefully limit appeals to those that demonstrate some merit and are not filed strictly to delay a proposed action.

CQ403

While this suggestion does not directly relate to the processes under the National Environmental Policy Act, it has important indirect implications. The Forest Service and other agencies iterate that NEPA documents are geared toward an appeals officer or a judge, and not for sound agency decision making. By bringing the appeals process more in line with meritorious appeals rather than appeals with a hidden agenda, CEQ and the agencies might be able to focus the NEPA process as it was originally intended.

9. State and local governments should be given more involvement in the NEPA process. In the Western United States, the federal government owns much of the land, including 87 percent of the entire state of Nevada. State and local governments have large stakes in federal activities occurring within their jurisdictions. Decisions made as a result of those analyses have significant impacts on these governments and the local population. State and local governments are often the best representatives of the social and economic fabric of the community. State and local governments will also often be called upon to enforce federal actions resulting from the process. While NEPA allows state and local governments to comment on NEPA analyses before going out for public comment, those entities have not generally been given the opportunity to participate fully in the NEPA process.

We believe the quality of NEPA analyses will greatly improve if state and local governments are provided more participation in the process. The law allows for "cooperating agency" status, whereby agencies participate as full partners in the process. State and local governments should automatically be provided the opportunity to participate as "cooperating agencies" for any NEPA analysis conducted within their jurisdictions.

10. Site-specific NEPA analyses should be limited to whether the proposed action is consistent with an applicable overall land use plan. A common criticism of the NEPA process is it is often duplicative. Nowhere is this more evident than in the land use planning process.

Both the Forest Service and the Bureau of Land Management (BLM) require the development of land use plans for their individual management units every 10 to 15 years. The NEPA analysis performed on these units is an Environmental Impact Statement for the entire unit.

The land management agencies also conduct NEPA analyses for each site-specific action that comprise the land use plan. For example, a land use plan might allow for a certain amount of livestock grazing within the unit. Land managers would also conduct a level of NEPA analysis for each allotment or permit within the unit as well. The same holds true for each oil and gas lease, or other action allowed by the land use plan. These analyses often duplicate the analyses conducted in the land use EIS.

These second tier analyses can be very expensive and time-consuming, often diverting scarce manpower resources from the work they are supposed to do.

A strong case can be made that these second tier analyses are unnecessary. The land management plan has already considered the environmental, social and economic impacts of

CQ403

the general activity on the land unit. The level of analysis typically conducted in such plans is site-specific enough to encompass site-specific activities. If the decision to permit livestock grazing in certain areas of a land unit has been made, of what value is it to require other analyses for each individual allotment or permit? Unless conditions have changed since the land management plan was developed, further analysis will be of no benefit. Environmental conditions have been considered, and decisions have been made based on that information. It certainly makes no sense to duplicate the prior analysis.

If site-specific analyses are to be required, their scope should be narrowed considerably. Any site specific NEPA document should only consider (1) whether conditions have appreciably changed since the unit EIS was conducted, and (2) whether the proposed site-specific action is consistent with the land management plan. Any other consideration should have already been a part of the EIS on the land management plan, and need not be duplicated.

Appropriate limitation of site-specific NEPA analyses to avoid duplication could save agencies significant money and manpower.

11. Appeals of site-specific NEPA analyses should be limited to whether the proposed action is consistent with any applicable land use plan. Similarly, appeals of site-specific NEPA documents should be limited to issues of changes in conditions since the land management plan was adopted and conformity of the site specific decision to the overall land management plan. Substantive decisions on land management occur at the land management planning level, and it makes sense from an efficiency standpoint that complaints about those decisions be heard at that time and in that process. If that is the case, no one will be denied a right to appeal or to challenge federal land management decisions, since they would be able to do so at the appropriate time.
12. CEQ regulations must be amended to permit timely projects beneficial to the environment, such as hazardous fuel reduction projects that promote the President's Healthy Forest Initiative. In an ironic twist to the whole NEPA issue, NEPA red tape has been used to thwart projects that are actually beneficial to the environment. Of course, this is not what Congress intended.

The most recent example of this relates to wildfires. The past few years have seen record fire seasons, both in intensity and the number of acres scorched. These wildfires burn hotter than normal fires, sterilizing the soil so regrowth takes decades instead of years.

There is general agreement that a major contributing cause of these devastating fires is the undergrowth and fuel loads have been allowed to build up over the past several years. It is imperative that these excess hazardous fuel loads be removed in order to restore our nation's forests to a healthy state and to minimize the devastation caused by wildfires. Hazardous fuel reduction projects suffer the same costly delays from NEPA as other projects.

CEQ regulations should be amended to either exempt hazardous fuel reduction projects in class 3 fire areas from NEPA requirements, or streamline the process so they may be conducted in a timely manner. There were several such projects that had been proposed in

CQ403


areas devastated by fires this summer, but those areas burned before the projects could be completed.

We would prefer regulations be amended to provide categorical exclusions for such projects deemed necessary. While no one can predict where fires will occur, agencies should prioritize those areas most at risk due to excess hazardous fuel loads, and thinning projects should be permitted to occur without NEPA delays or with minimal NEPA requirements. NEPA does allow for emergency situations, but emergencies are usually only declared after a devastating wildfire. The goal here is to prevent those fires from occurring in the first place.

We would be happy to work with the Task Force to develop more specific recommendations on this issue.

We commend the Task Force for undertaking the daunting but absolutely necessary task of reviewing and revising the NEPA process to better reflect the experience gained in the last 30 years. We hope these suggestions are helpful, and Farm Bureau stands ready to assist the Task Force in any way possible.

Sincerely,


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